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In the Supreme Court of the United States

OCTOBER TERM, 1979

HERMAN DIAMOND, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the United States' exercise of regulatory jurisdiction over Georgia tidal marshlands within the navigable waters of the United States pursuant to Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403, is prohibited by an 1802 agreement between the United States and the State of Georgia establishing the boundaries of that state or this Court's

decision in *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977).

2. Whether the district judge erred in denying petitioner's application for his recusal.

3. Whether the United States Attorney was authorized to file and prosecute a civil action to enjoin petitioner, who had not obtained the necessary permit from the Corps of Engineers, from filling a tidal marsh in the navigable waters of the United States.

4. Whether petitioner was denied due process by the district court's consolidation of the two cases on review here.

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OPINIONS BELOW

The April 28, 1980, opinion of the court of appeals and the June 24, 1980, substitute opinion of the court of appeals rendered on the government's petition for rehearing in the nature of clarification (Pet. App. 16a–18a) are not reported. The district court's August 2, 1978, opinion denying petitioner's motion to set aside the judgment in Civ. Action No. 3092 (App. A, *infra*, 1a–13a) and its August 2, 1978, opinion in Civ. Action No. 475–221 (App. B, *infra*, 14a–21a) are not reported. The district court's order of May 9, 1979, denying petitioner's application for recusal (App. C, *infra*, 22a–25a) and the July 20, 1979, order granting summary judgment to the defendants in Civ. Action No. 477–80 (App. D, *infra*, 26a–35a) are likewise not reported.[1]

The district court's previous opinion in Civ. Action No. 3092 is not reported. The Fifth Circuit's opinion affirming the district court's judgment on the earlier occasion is reported at 512 F.2d 157 (1975), and this Court's denial of certiorari is reported at 423 U.S. 928 (1975).

JURISDICTION

The judgment of the court of appeals was entered on April 28, 1980. Petitioner's petition for rehearing was denied on May 23, 1980. The government's petition for rehearing in the nature of clarification was granted, and a substitute opinion was rendered on June 24, 1980. Petitioner's petition for rehearing, reclarifica-

[1] The district court opinions were not included in petitioner's appendix and have therefore been reproduced here.

tion, and recall of mandate was denied on July 21, 1980. The petition for a writ of certiorari was filed on August 8, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is the owner of a tract of tidal marshland along Richardson Creek, a navigable tributary of the Wilmington River located in Chatham County, Georgia. In 1965, petitioner received permission from the United States Army Corps of Engineers to build a dock into Richardson Creek, but did not apply for a permit to fill the land. Petitioner began filling his property in 1966 and continued through 1973. Commencing in 1972, representatives of the Corps and the Georgia Department of Natural Resources repeatedly informed petitioner that the filling was unauthorized and illegal.[2] Thereafter, on April 5, 1973, the United States filed an action against petitioner in the United States District Court for the Southern District of Georgia seeking a permanent injunction against further filling of the tidal marsh and a mandatory injunction to compel removal of the illegally placed fill. The State of Georgia was granted leave to intervene as a plaintiff. The district court found that the area that had been filled by petitioner was within the navigable waters of the United States and that petitioner's filling in the absence of a Corps of Engineers permit violated Section 10 of the Rivers and Harbors Act of

[2] As a result of one encounter, petitioner was arrested and charged in Chatham County Court with the misdemeanor offense of filling marshland without a state permit. Petitioner was acquitted, after a jury trial, on January 22, 1974.

1899, 33 U.S.C. 403. The district court therefore permanently enjoined petitioner from further fill activities on his property. *United States* v. *Diamond*, Civ. Action No. 3092 (S.D. Ga. April 17, 1974).

Petitioner appealed to the United States Court of Appeals for the Fifth Circuit, which affirmed. *United States* v. *Diamond*, 512 F.2d 157 (1975). The Fifth Circuit rejected, *inter alia*, petitioner's arguments that the United States Attorney had not been authorized to commence or prosecute the action and that petitioner's filled property did not lie within the navigable waters of the United States. Petitioner then sought review in this Court, raising, *inter alia*, the question whether the United States' exercise of regulatory jurisdiction over Georgia tidal marshlands within the navigable waters of the United States conflicts with the 1802 "Georgia Cession" (1 *American State Papers (Class VIII)—Public Lands*, Document No. 69 (Lowrie ed. 1834) (Pet App. 1a-2a)) establishing the boundaries of that state. No. 75-287, O.T. 1975, Pet. 9. This Court denied certiorari. 423 U.S. 928 (1975).

2. Petitioner had filed an application with the Corps of Engineers for an after-the-fact permit to authorize existing and future fill. The Corps denied this permit application on March 26, 1974, citing detrimental effects of the proposed fill and adverse comments from interested parties and the State of Georgia. See 33 C.F.R. 209.120(f) (1974). Petitioner than filed an action in the United States District Court for the Southern District of Georgia, *Diamond* v. *United States*, Civ. Action No. 475-221, to obtain judicial review of the permit denial. The district court granted the gov-

ernment's motion to consolidate this action with Civ. Action No. 3092, the government's injunctive action discussed above. Petitioner also filed motions under Fed. R. Civ. P. 60(b) seeking relief from the judgment in Civ. Action No. 3092 on various grounds and moved to set aside the order consolidating the two cases.

On August 2, 1978, the district court rendered two separate opinions, one denying the Rule 60(b) motions in Civ. Action No. 3092 (App. A, *infra*) and the other upholding the denial of the after-the-fact permit in Civ. Action No. 475-221 (App. B, *infra*). The court found that petitioner's motions to set aside the judgment in Civ. Action No. 3092 were untimely in part and were, in any event, without merit. The court rejected petitioner's renewed arguments that the filled tidal marsh lies outside the navigable waters of the United States, that the land is outside the jurisdiction of the Corps of Engineers under the 1802 "Georgia Cession" or 16 U.S.C. 662(h), and that the filing of the government's original complaint was unauthorized. In Civ. Action No. 475-221, the district court found that the Corps' denial of a permit was rational and in accordance with law. The court also denied petitioner's motion to set aside the consolidation of the two actions, citing its broad discretion in the management of its own docket (App. A, *infra*, at 12a-13a).

3. In the interim, petitioner had commenced *Diamond* v. *Marland*, Civ. Action No. 477-80 (S.D. Ga.), a civil rights damage action against an official of the Georgia Department of Natural Resources and various officials of the Corps of Engineers, charging that the defendants caused him to be illegally arrested

in 1973 (see page 2, note 2, *supra*), had conspired to secure filing of the complaint in the government's injunctive action (Civ. Action No. 3092), and had presented false or misleading testimony or prepared misleading evidence in that case. Petitioner moved to disqualify District Judge Lawrence in this damage action pursuant to 28 U.S.C. 144. The application rested essentially upon the Judge's conduct of the government's injunctive action. This application was denied from the bench, and the court subsequently received a letter from petitioner's counsel disclaiming any intention to pursue the matter (App. C, *infra*, 23a, n.2)

On May 7, 1979, three days prior to a scheduled hearing on defendants' motions for summary judgment in the damage action, petitioner, by then acting *pro se*, filed a "Complaint and Injunction," designated Civ. Action No. 479–159, by which he again sought to disqualify the District Judge from continuing to preside in the damage action. He alleged personal bias and recited in addition that Judge Lawrence had ruled against him regarding the 1802 "Georgia Cession" and had confiscated petitioner's property. Treating the complaint as a renewed application for recusal pursuant to 28 U.S.C. 144 and 455, the district court denied the application (App. C, *infra*). The court noted that all of petitioner's allegations, save one, complained of his judicial conduct and essentially challenged prior rulings. The remaining allegation, asserting the judge's membership in a club claimed to exclude members of an unspecified "minority class" to which petitioner allegedly belongs, was found legally insufficient to support disqualification.

The district court entered an opinion on July 20, 1979, granting summary judgment as to all defendants who had been served in the damage action (App. D, *infra*). The court held that all of petitioner's claims were barred by *res judicata* and collateral estoppel based upon the judgments in Civ. Action Nos. 3092 and 475–221, *supra*, and a prior damage action in which the district court had also granted summary judgment for the defendants. *Diamond* v. *Marland*, 395 F. Supp. 432 (S.D. Ga. 1975).[3]

4. The court of appeals affirmed the various judgments and orders appealed from in a single per curiam opinion (Pet. App. 16a–18a), stating only that its ruling did not impair petitioner's right to maintain a dock, as distinguished from filling.[4]

ARGUMENT

The decision below is correct, does not conflict with any decision of this Court or any court of appeals, and does not present any issue warranting review by this Court. The petition for certiorari is the culmination of years of litigation in numerous actions and seeks to re-open matters that were fairly, correctly, and finally decided.

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[3] Petitioner did not appeal the adverse judgment in the earlier damage action.

[4] In addition to the actions discussed above, petitioner brought a damage action against the Assistant United States Attorney who handled Civ. Action No. 3092. Summary judgment was granted to the defendant based upon official immunity. *Diamond* v. *Walter*, Civ. Action No. 479–87 (S.D. Ga.). The court of appeals affirmed on August 5, 1980. *Diamond* v. *Walter*, No. 80–7121 (5th Cir.). Petitioner has petitioned for rehearing.

1. Petitioner asserts (Pet. 8–10) that, despite the provisions of the Rivers and Harbors Act of 1899, the State of Georgia has exclusive jurisdiction to regulate activities, including fill, in navigable waters within its boundaries. This is plainly incorrect. See, *e.g.*, *Kaiser Aetna* v. *United States*, 444 U.S. 164, 171–172 (1979), and cases cited therein. In support of his contention, petitioner cites the 1802 "Georgia Cession," an agreement negotiated between commissioners representing the United States and comissioners representing Georgia, fixing the boundaries of that State and ceding excess territory claimed by Georgia to the United States.[5] Nothing in this agreement, authorized by the Act of April 7, 1798, ch. 28, 1 Stat. 549, and the Act of May 10, 1800, ch. 50, 2 Stat. 69, relinquishes the power of the United States under the Commerce Clause (see *Kaiser Aetna* v. *United States*, *supra*) to regulate the use of navigable waters.[6] Petitioner mistakes a disclaimer of federal title for relinquishment of regulatory power. Federal power to regulate placement of fill in the navigable waters of the United States does not depend on title to land. *Zabel* v. *Tabb*, 430 F.2d 199, 206 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971); cf. *United States* v. *Rands*, 389 U.S. 121, 127 (1967). Petitioner's reliance on *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.*, 429

[5] As noted at page 3, *supra*, petitioner raised this issue in his earlier petition for certiorari in No. 75-287.

[6] Article II of the Cession (Pet. App. 2a–3a), on which petitioner apparently relies, merely disclaims any federal assertion of plenary jurisdiction of the kind exercised in the territories as to lands within the Georgia boundaries established. Georgia's sovereignty within its boundaries thus remained equal to that of all other states.

U.S. 363 (1977), is misplaced for the same reason. *Corvallis* holds only that state law ordinarily controls the determination of the effect of movement of a navigable river upon title to the riverbed. The determination of title is not in issue here.

2. Petitioner challenges (Pet. 10–11) Judge Lawrence's denial of his application for recusal. The application stated no grounds sufficient to require recusal. It is fundamental that in order to require recusal the "alleged bias and prejudice * * * must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583 (1966). Here, petitioner's allegations related to past judicial rulings. Disqualification was not appropriate in these circumstances. See, *e.g.*, *In re International Business Machines Corp.*, 618 F.2d 923, 928 (2d Cir. 1980). The remaining ground offered in support of the request for recusal—the district judge's alleged membership in a club excluding members of an unspecified class including petitioner—is insufficient to show personal bias infecting the court's ruling. *Parrish* v. *Board of Commissioners of the Alabama State Bar*, 524 F.2d 98, 101 (5th Cir. 1975) (en banc), cert. denied, 425 U.S. 944 (1976); cf. *Parker Precision Products Co.* v. *Metropolitan Life Ins. Co.*, 407 F.2d 1070, 1077–1078 (3d Cir. 1969).[7]

[7] Petitioner has now urged (Pet. 10–11) new grounds for disqualification pertaining to the district judge's personal associations, which were not presented below. They should not be considered here. In any event they present no more basis for recusal than the grounds previously urged. We also question the

3. Petitioner challenges (Pet. 18–19) the authority of the United States Attorney to file and prosecute Civ. Action No. 3092. He argued this point unsuccessfully to the Fifth Circuit on his first appeal in 1975 (*United States* v. *Diamond, supra,* 512 F.2d at 159), but declined to raise it in his petition for certiorari seeking review of that judgment. Petitioner's contention is, in any event, without merit. Pursuant to 33 U.S.C. 413, it is the responsibility of the Department of Justice to "conduct the legal proceedings necessary to enforce the provisions of * * * [33 U.S.C.] 403 * * *." This responsibility may be carried out through the appropriate United States Attorney. 28 U.S.C. 547.[8]

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timeliness of petitioner's May 7, 1979, application for recusal. See 28 U.S.C. 144; *In re International Business Machines Corp., supra,* 618 F.2d at 932.

[8]Petitioner has previously argued that the filing of the complaint in Civ. Action No. 3092 was unauthorized, absent a request therefor from the Secretary of the Army or his delegate. On petitioner's first appeal to the Fifth Circuit, that court correctly concluded that no such request was necessary. *United States* v. *Diamond, supra,* 512 F.2d at 159. Moreover, the record below shows that a request was in fact made.

Petitioner's allegations (Pet. 11–12) of misconduct by the attorney for the government are utterly unfounded. Petitioner's claims apparently refer to an unrelated case, because Chief Judge Brown, who petitioner asserts questioned Assistant United States Attorney Walter's conduct, was not on the panel that rendered either of the court of appeals' opinions in this litigation. We were informed by the United States Attorney's Office that the incident to which petitioner probably refers was a suggestion by Chief Judge Brown at oral argument in an unrelated criminal case that, inasmuch as Mr. Walter's conduct of the prosecution had been questioned, albeit unsuccessfully, it would have been preferable to assign the appellate argument for the government to another attorney. No court reprimanded Mr. Walter for prosecutorial misconduct, nor was he severed in-

4. Petitioner seems to perceive (Pet. 19–22) a denial of due process in the court of appeals' citation of its earlier decision in *United States* v. *Diamond*, 512 F.2d 157, cert. denied, 423 U.S. 928 (1975). Petitioner describes the earlier judgment as vacated. This is incorrect. The court of appeals never vacated its judgment. Petitioner apparently argues that the district court's consolidation of Civ. Action No. 475–221 (the action for review of the Corps' denial of an after-the-fact permit) with Civ. Action No. 3092 automatically vacated the judgment of the district court in the latter case, which had by then been affirmed by the court of appeals, with review denied by this Court. It is a sufficient answer to this novel contention to note that the consolidation of cases does not destroy the separate identity of each. *Johnson* v. *Manhattan Ry.*, 289 U.S. 479, 496–497 (1933); *Zdanok* v. *Glidden Co., Durkee Famous Foods Division*, 327 F.2d 944 (2d Cir.), cert. denied, 377 U.S. 934 (1964).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1980

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voluntarily from employment with the United States Department of Justice.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA SAVANNAH DIVISION

Civil Action No. 3092
Civil Action No. 475–211

UNITED STATES OF AMERICA, PLAINTIFF

v.

HERMAN DIAMOND, DEFENDANT

HERMAN DIAMOND, PLAINTIFF

v.

UNITED STATES OF AMERICA AND UNITED STATES ARMY CORPS OF ENGINEERS, SAVANNAH DISTRICT, DEFENDANTS

OPINION AND ORDER ON DIAMOND'S MOTIONS TO SET ASIDE PRIOR JUDGMENT AND ORDER OF CONSOLIDATION OF THE TWO ACTIONS

I

On April 5, 1973, the United States filed a suit against Herman Diamond. I will hereafter refer to this action as Suit One. The complaint alleged that defendant was illegally filling estuarine marshes in violation

of 33 U.S.C. §§ 403 and 407.[1] The land in question is marshland lying on Richardson Creek in Chatham County, Georgia. The Government sought a permanent injunction against further filling and a mandatory injunction to remove existing fill or, alternatively, compensatory and punitive damages.

I entered a temporary restraining order on the same day the action was filed.

On April 7, 1973, the State of Goergia requested leave to intervene in the action. The Intervenor sought a permanent injunction, pursuant to State law and regulations, against further filling of the coastal marshlands of Georgia. I granted the motion subject to objection by defendant. The intervention raised the question of the State's title to marshlands. I have never ruled on that issue and do not intend to.

On June 14, 1973, Mr. Diamond applied to the Corps of Engineers for an after-the-fact permit allowing him to continue the fill operations on his property. In a letter dated March 26, 1974, the District Engineer denied such application on the ground that "the issuance of an After-the-Fact Permit for the proposed and existing fill would not be in the public interest. . . ."

An Opinion-Order was issued in Suit One on April 17, 1974. In it this Court found that Richardson Creek was navigable within the meaning of the Rivers and Harbors Act of 1899. "Defendant filled the two-acre

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[1] Section 403 prohibits "creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States. . . ." Section 407 prohibits discharging or depositing any refuse into navigable waters or tributaries of navigable waters.

marsh area without a Permit from the Army and continued to fill after being warned that such activity was illegal." I further ruled that "the area filled in by Mr. Diamond would have been inundated at mean high water had not the same been filled" and that as a matter of law the fill area was within the navigable waters of the United States. Diamond had violated the Rivers and Harbors Act, this Court held, by filling marshland without a permit.

Subsequently, a permanent injunction issued prohibiting further fill or construction operations on the site. I abstained, however, from ruling on the mandatory injunction pending outcome of the administrative process. See *United States* v. *Moretti, Inc.*, 478 F.2d 413 (5th Cir.).

In *United States* v. *Diamond*, 512 F.2d 157 the Fifth Circuit affirmed this Court's ruling. Application for certiorari was denied, 423 U.S. 928.

On August 28, 1975, Diamond filed the instant suit in this Court under the Administrative Procedure Act (5 U.S.C. § 701 *et seq.*). It is denominated as Suit Two.[2] In it Diamond sought review of the agency's action, alleging that the denial of the permit was arbitrary and capricious and that it exceeded the Corps' statutory authority. In December, 1975 this Court consolidated the two suits, pursuant to Rule 42(a). Almost a year after filing Suit Two, Mr. Diamond filed a motion for stay and remand for completion of the

[2]There is also a third suit currently pending, Herman Diamond v. Dr. Frederick C. Marland et al. CV 477–80. In that suit, Mr. Diamond revives a claim decided against him in *Diamond* v. *Marland*, 395 F. Supp. 432 (S.D., Ga.).

administrative proceedings then in process. Concluding that Mr. Diamond's administrative remedies had been exhausted, I denied the motion in an Order dated August 9, 1976.

Undaunted by the adverse decisions of the Corps of Engineers, this Court and the Fifth Circuit, Diamond (who proceeds *pro se*) has filed numerous post-judgment motions in which he seeks the reopening and reconsideration of both Suits One and Two. I will consider first the motions pending in Suit One and then take up the motion in Suit Two.

II

On April 13, 1976, Diamond filed a motion pursuant to Rule 60(b) for relief from the judgment in Suit One. Alleging additional grounds for relief, he sought to amend this motion on June 2, 1976, and on June 28, 1977.[3] In all, Diamond enumerates six bases for setting aside the judgment in Suit One. In his briefs and letters to this Court, defendant raises still other grounds which might be construed as additional grounds for his motion.

The simple truth of the matter is that Mr. Diamond is trying to relitigate a case decided against him by this Court in 1974 and affirmed by the Fifth Circuit on appeal.

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[3] Rule 60(b) provides that motions must be made within a reasonable time or, if under 60(b)(1), (2), or (3), within one year from judgment. The random approach Mr. Diamond has taken appears to put him beyond a reasonable time. However, I do not decide the motions on that basis except where the one year limitation is applicable.

III

Rule 60(b) provides for relief from judgments on several grounds.[4] Whether to grant relief from judgment under Rule 60(b) is within the sound discretion of the district court. *Fackelman* v. *Bell*, 564 F.2d 734 (5th Cir.); *Hand* v. *United States*, 441 F.2d 529 (5th Cir.).

The Government contends that this Court lacks jurisdiction over the 60(b) motions because the judgment in question was affirmed on appeal. It cited *Butcher & Sherrerd* v. *Welsh*, 206 F.2d 259 (3rd Cir.) in support of that position. That view was changed by the decision of the Supreme Court of the United States in *Standard Oil Co. of California* v. *United States*, 429 U.S. 17. In that case, the Supreme Court held that a district court does not need appellate permission to reopen a case after it has been reviewed on appeal and affirmed. The Court found the reasons supporting the requirement of appellate leave to be unpersuasive and stated that "we have confidence in the ability of district courts to recognize frivolous Rule 60(b) motions." 429 U.S. at 19.

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[4] "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, suprise, or excusable neglect; (2) newly discovered evidence . . .; (3) fraud . . . , misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied . . . ; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. . . ."

I will take up now Diamond's various motions and the applicable subsections of Rule 60(b).

IV

In his original post-judgment motion, Diamond argued that the judgment should be set aside under 60(b)(6) because Government Exhibit 1 is inaccurate and was not introduced in evidence.[5] He alleges that my Order of April 17, 1974, was substantially based on this exhibit. He contends that the overlay of aerial photographs attached to the exhibit was not properly superimposed and did not correctly indicate his property and fill area. In one of the amendments, Diamond claims that the survey of his property by the Corps was inaccurate and that reliance thereon constituted fraudulent misrepresentation and misconduct.[6]

The motion is ostensibly based on Rule 60(b)(6) which provides for relief for any other reason justifying same. However, it must be considered as one under 60(b)(3). Motions to set aside for misrepresentation or misconduct fall within 60(b)(3). "Where either Clauses (b)(1), (2), (3), (4), or (5) provide coverage for the movant's claim, relief may not be obtained pur-

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[5]The record reflects that the Exhibit was introduced at the hearing on August 29, 1973. See also "Clerk's Certificate As to Exhibits" sent up on appeal. Even if it were not introduced, the objection should have been made at the time or, at least, within one year of judgment.

[6]Although this motion is decided on the technical ground of Rule 60(b), I impute no fraud or misconduct to the Government or its witnesses. I do not believe or find that any fraud was perpetrated upon this Court. See generally *England* v. *Doyle*, 281 F.2d 304 (9th Cir.).

suant to Clause (b)(6)." *Gulf Coast Building and Supply Company* v. *International Brotherhood of Electrical Workers, Local No. 480*, 460 F.2d 105 (5th Cir.). See also *Ackermann* v. *United States*, 340 U.S. 193; *Klapprott* v. *United States*, 335 U.S. 601.

As stated, motions under 60(b)(3) must be brought within one year of the judgment. Since the motion to set aside was filed more than two years after judgment, it must be dismissed as untimely filed. See *Prickett* v. *Duke Power Company*, 49 F.R.D. 116 (D.S.C.), aff'd 429 F.2d 984 (4th Cir.).

V

In his motion of April 13, 1976, Diamond moved for relief under 60(b)(4) from a void judgment. A judgment is void under 60(b)(4) "only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law." 11 Wright and Miller, *Federal Practice and Procedure: Civil*, at 198–200 (footnotes omitted). Apparently, there is no time limit for presenting such a motion if the court lacks jurisdiction. *Misco Leasing, Inc.* v. *Vaughn*, 450 F.2d 257 (10th Cir.).

Diamond claims that this Court was without jurisdiction because the United States in 1802 ceded to the State of Georgia all lands within the boundaries of the State. He contends that under 43 U.S.C. § 1311 the cession of lands to Georgia divests the United States of any jurisdiction over his property. The Submerged Lands Act provides that title to and ownership of lands beneath navigable waters within each state is in

the state. 43 U.S.C. § 1311(a).[7] Diamond claims that the prior judgment is void because the Rivers and Harbors Act, 33 U.S.C. § 403, conflicts with the 1802 cession and that the exercise of federal jurisdiction in this case is "ex post facto."

That argument has been made before without success. "Congress clearly has the power under the Commerce Clause to regulate the use of Landholders' submerged riparian property for conservation purposes and has not given up this power in the Submerged Lands Act." *Zabel* v. *Tabb*, 430 F.2d 199, 206 (5th Cir.), cert. den. 401 U.S. 910.

VI

Mr. Diamond urges four reasons for setting aside the judgment under 60(b)(6), that is, "any other reason justifying relief."

A. First, he says that *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363 "established that Riparian Rights supercede the Federal Agency Rule that Federal Jurisdiction extends to the Mean High Water Line, within the boundaries of the State of Georgia. [Diamond] has Riparian Rights to low water mark under Georgia statutes." In *Corvallis*, the highest Court held that ownership of riverbeds within a state should be determined by state, rather than federal, law.

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[7] The United States specifically retained the right to control those lands and waters for navigation, flood control, and power production. 43 U.S.C. § 1311(d). Moreover, it retained its "powers of regulation . . . for the constitutional purposes of commerce. . . ." 43 U.S.C. § 1314.

That decision avails Mr. Diamond nought. The issue here is not the ownership of submerged lands. It is whether the Corps has jurisdiction to regulate the use of such land. That the Corps does have such power has already been established. *Zabel* v. *Tabb, supra.* Richardson Creek has been found to be, and is, navigable within the meaning of 33 U.S.C. §§ 403, 407; and Diamond's property is below the mean high water mark. *United States* v. *Diamond*, 512 F.2d 157, cert. den. 423 U.S. 928.

B. Secondly, Mr. Diamond argues that his property is less than ten acres and as such is exempt from Corps regulations. 16 U.S.C. § 662(h). It is not apposite. That section states that "[t]he provisions of sections 661 to 666c of this title shall not be applicable to those projects for the impoundment of water where the maximum surface area of such impoundments is less than ten acres. . . ." Mr. Diamond misconstrues the exception. The Act "requires that any federal agency granting a permit for license to modify any stream or body of water shall first consult with the United States Fish and Wildlife Service, Department of the Interior and also with the head of the agency exercising administration over the wildlife resources of the particular state. . . ." *United States* v. *Stoeco Homes, Inc.*, 498 F.2d 597, 606 (3rd Cir.), cert. den. 420 U.S. 927. See also *Zabel* v. *Tabb, supra*, 430 F.2d at 206. Such consultation is not required if the impoundment is less than ten acres. The exemption does not restrict the jurisdiction of the Corps.

C. Diamond's third basis for setting aside the judgment under Rule 60(b)(6) is that the complaint filed by

the United States was void. Although his argument is not clear, he alleges two reasons which he contends voided the complaint.

First, he argues that an affidavit used in support of the temporary restraining order was void. Dr. Frederick Marland from the Georgia Department of Natural Resources signed the affidavit that is required in support of a temporary restraining order. F.R.Civ.P. 65(b). Mr. Diamond contends that Dr. Marland was not authorized to sign such an affidavit.[8] How such a contention would void the complaint in Suit One is beyond me.

In his affidavit, Dr. Marland stated that he observed two truck loads of fill material being dumped on Diamond's property; that he saw Diamond push this material into the marsh with a bulldozer, and that, in his judgment, such filling would cause irreparable harm to the marshlands.[9] To support a temporary restraining order, "the evidentiary quality of the affidavit must be sufficient to convince a court that there is immediate and great danger of irreparable injury. . . ." 11 Wright & Miller, *Federal Practice and Procedure: Civil* at 515. Dr. Marland's affidavit met that standard.

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[8] Mr. Diamond has confused what he perceives to be the power to arrest with the right to submit an affidavit. He points out that in *Howell* v. *State*, 238 Ga. 95, the Georgia Supreme Court held unconstitutional a statute that made a violation of the regulations of the Department of Natural Resources a misdemeanor. However, Dr. Marland is not thereby prohibited from submitting affidavits in support of the civil action.

[9] See in this connection, *Diamond* v. *Marland*, 395 F. Supp. 432 (S.D., Ga.).

Secondly, Diamond contends that the complaint was void because no official designated by 33 U.S.C. § 413 had requested the United States Attorney to initiate such an action.[10] He made this same argument on his appeal in Suit One. The Fifth Circuit responded that "the United States Attorney's duty to prevent violations of the law justifies his taking action against illegal fill operations regardless of who brings the violation to his attention." *United States* v. *Diamond, supra*, 512 F.2d at 159.

D. Finally, Diamond seeks to set aside the judgment on the grounds that the United States and the State of Georgia are guilty of malicious abuse of process and of placing him in double jeopardy. This contention is based on the fact that he was found not guilty in Chatham County Superior Court on the criminal charge of illegal fill activity. He asserts that the United States by initiating the civil action in Suit One and the State of Georgia by intervening in Suit One have placed him in double jeopardy and have abused the judicial process.

Again, Mr. Diamond misconceives the law. He fails to recognize that liability in a civil case may be based on a lesser standard of proof than that required for a criminal conviction. Acquittal of criminal charges would not preclude the State from seeking civil remedies. See *Lewis* v. *Frick*, 233 U.S. 291; *United States* v. *Burch*, 294 F.2d 1 (5th Cir.). Even if Suit One were

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[10] Section 413 provides that "it shall be the duty of United States Attorneys to vigorously prosecute all offenders . . . whenever requested to do so by the Secretary of the Army or by any of the officials hereinafter designated. . . ."

a criminal case, no bar of double jeopardy arising from his acquittal of State criminal charges could be raised against the United States. The Constitution does not prohibit dual prosecutions by dual sovereigns. *United States* v. *Corbo*, 555 F.2d 1279 (5th Cir.). Mr. Diamond raised this issue in *Diamond* v. *Marland*, 395 F. Supp. 432 (S.D., Ga.). It was decided adversely to him and he cannot now relitigate it.

The other points argued in his briefs and letters to this Court are equally devoid of merit.

MOTION TO SET ASIDE ORDER CONSOLIDATING SUITS ONE AND TWO

On June 30, 1977, eighteen months after this Court ordered Suits One and Two to be consolidated, Mr. Diamond moved to set aside the consolidation. He argues that, because of the posture of the two cases, the consolidation will prevent his receiving a fair and impartial trial in Suit Two. His precise position is not at all clear.[11]

Rule 42(a) provides that the district court may consolidate all actions "involving a common question of law or fact." In Suits One and Two, the parties are the same, and the actions arise from the same set of facts, Diamond's illegal fill activity. The operative facts have previously been before this Court. The two cases overlap because a wrongful denial of the after-the-fact permit in Suit Two could vitiate the prior judgment of this Court in Suit One.

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[11] Both actions are before this Court, not before a jury. I fail to see how consolidation could prejudice the parties.

"A trial court has broad discretion in determining whether to consolidate a case pending before it." *National Association for the Advancement of Colored People of Louisiana* v. *Michot*, 480 F.2d 547 (5th Cir.). Further, they possess inherent power to manage their dockets expeditiously. See *In re Air Crash Disaster at Florida Everglades*, 549 F.2d 1006 (5th Cir.).

In any event, the ruling by this Court on the motions in Suit One moots the motion to set aside the consolidation of the two lawsuits.

ORDER

Diamond's various motions pending in Civil Action No. 3092 and CV475-211 are overruled and judgment will issue accordingly.

This August 2nd, 1978.

/s/ ALEXANDER A. LAWRENCE

Judge, United States District Court
Southern District of Georgia

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA SAVANNAH DIVISION

Civil Action No. 3092
Civil Action No. 475–221

UNITED STATES OF AMERICA, PLAINTIFF

v.

HERMAN DIAMOND, DEFENDANT

HERMAN DIAMOND, PLAINTIFF

v.

UNITED STATES OF AMERICA AND UNITED STATES ARMY CORPS OF ENGINEERS, SAVANNAH DISTRICT, DEFENDANTS

ORDER AND OPINION IN HERMAN DIAMOND VS. UNITED STATES OF AMERICA AND UNITED STATES ARMY CORPS OF ENGINEERS (CV475–221)

I have this day entered an Order denying the pending motions of Herman Diamond in these consolidated cases. The material facts were dealt with at some length. The issues involved in this case concern only the second suit, *Diamond* v. *United States*, CV475–221.

A short conspectus of that litigation will be helpful. On June 14, 1973, Mr. Diamond applied for an after-

the-fact permit for filling of a marsh area on Richardson Creek in Chatham County, Georgia. The District Engineer denied the application on March 26, 1974. The applicant then filed suit under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* Essentially, plaintiff alleges that the denial of the after-the-fact permit was arbitrary and capricious.

An evidentiary hearing was held in this Court on April 17, 1976. Subsequent hearings have been had. Both sides have filed briefs.

I

Before addressing the merits, I take up one matter. On April 13, 1976, Mr. Diamond filed, without leave of court, an amendment to his complaint. It adds five new numbered paragraphs and a prayer for relief. The amendment specifies wherein the District Engineer erred in denying the requested permit. It alleges that the Government has unlawfully confiscated plaintiff's property for which compensatory damages of $100,000 are sought.

The Government has moved to strike paragraph 7 of the amendment. It asserts

> "That by reason of the aforesaid facts and acts of the defendants, and the premises herein, the aforesaid property of the plaintiff has been unlawfully confiscated by defendants, thereby denying plaintiff the use of said property and causing plaintiff unnecessary expense, all to the damage of the plaintiff in the amount of One Hundred Thousand ($100,000.00) Dollars. . . ."

The Government contends that Diamond has not complied with Rule 15(a). The amendment was not

filed until nearly five months after the filing of defendant's answer to the original complaint. As stated, no leave to amend was sought or obtained. Such permission "shall be freely given when justice so requires." Rule 15(a). See *Foman* v. *Davis*, 371 U.S. 178. "But if a complaint or an answer, as amended, would be subject to a motion to dismiss under Rule 12(b)(6) or a motion to strike under Rule 12(f), as the case may be, it would be an idle move for the court to allow such an amendment over the objection of the opposing party. . . ." 3 *Moore's Federal Practice*, ¶ 15.08[4] at 904.

Upon timely motion, "the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Rule 12(f). However, "motions to strike are viewed with disfavor by the courts." *Great Northern Paper Company* v. *Babcock & Wilcox Company*, 46 F.R.D. 67, 69 (N.D., Ga.). "Therefore, such motions will not be granted unless the allegations are so immaterial that they can have no possible bearing on the issues at trial and unless their presence unduly prejudices the opposing party. . . ." *United States* v. *Southern Motor Carriers Rate Conference*, 439 F. Supp. 29, 39 (N.D., Ga.).

Rule 12(f), according to 5 Wright & Miller, *Federal Practice and Procedure: Civil* at p. 782, "is neither an authorized nor a proper way to procure the dismissal of all or a part of a complaint. . . ." The Government's motion to strike is in the nature of one for dismissal or

partial summary judgment. "[W]hen there is no showing of prejudicial harm to the moving party, the courts generally are not willing to determine disputed and substantial questions of law upon a motion to strike. Under such circumstances, the court may properly, and we think should, defer action on the motion and leave the sufficiency of the allegations for determination on the merits." *Augustus* v. *Board of Public Instruction of Escambia County, Florida*, 306 F.2d 862, 868 (5th Cir.).

The Government's motion to strike the amendment is denied and same is permitted to be filed.

II

Although the Secretary of the Army has wide discretion in granting or denying after-the-fact permits, his decision may be reviewed in the district court. 5 U.S.C. § 706. See *Zabel* v. *Tabb*, 430 F.2d 199 (5th Cir.), cert. den. 401 U.S. 910. However, the court "may not substitute its judgment for that of the Secretary." *Di Vosta Rentals, Inc.* v. *Lee*, 488 F.2d 674, 678 (5th Cir.), cert. den. 416 U.S. 984.

In his original complaint, Mr. Diamond complained of the Secretary's decision on four grounds. He tracked the language of 5 U.S.C. § 706(2)(A), (B), (C), and (D).[1] The standard of review in such cases is whether "there was a rational basis for the denial of

[1] To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the

the permit." *Joseph G. Moretti, Inc., v. Hoffman*, 526 F.2d 1311 (5th Cir.).[2]

At the hearing on April 17, 1976, Colonel Edwin C. Keiser, then the District Engineer of the Corps of Engineers at Savannah, explained his reasons for denying the permit. In reaching his decision, Colonel Keiser relied on 33 C.F.R. § 209.120. (Gov't. Ex. A). That regulation provides that "The benefit which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. . . . All factors which may be relevant to the proposal must be considered . . . . No permit will be granted unless its issuance is found to be in the public interest."[3]

Colonel Keiser gave the following explanation for denying the after-the-fact permit sought by Diamond:

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meaning or applicability of the terms of an agency action. The reviewing court shall—. . .

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law.

[2]The substantial evidence test under 5 U.S.C. § 706(2)(E) is not applicable. See *Camp* v. *Pitts*, 411 U.S. 138.

[3]These proposed regulations were effective on May 4, 1973. Mr. Diamond's application was filed on June 14, 1973 while the proposed regulations were still in effect. The applicable provisions are the same as those currently in effect. See 33 C.F.R. § 209.120(f).

"Well, basically, in evaluating the public interest aspect it did not appear that this would be in the public interest, that it was not the best alternative use of the land. It disrupted the food chains, had an adverse effect on fisheries, as well as on wildlife in the area, had water quality implications, a change in land use from marsh land the productive use in that regard—as I say, I considered alternatives, and there seemed to be other feasible alternatives that would not destroy the marsh to have access to the water for boating. I considered the views of the other agencies and particularly in areas in which they have cognizance in reaching my decision as well, and their obligation to the fact that this fill had been placed below mean high water without prior authorization."

Tr. pp. 9–10.

The District Engineer relied on responses to a public notice which he had issued on October 2, 1973. (Gov't. Ex. 2). Both the Department of the Interior and the Environmental Protection Agency recommended denial of the permit. The responding State agencies felt that application should be first made to them. The Ogeechee Audubon Society objected to the fill. Colonel Keiser relied on a 1932 Corps report to determine navigability of the area involved. (Tr. p. 15). He also considered a topographic map prepared from a supplementary survey. (Tr. p. 18).[4] He verified the

[4] Much ado has been made concerning the fact that the overlay introduced at the hearing does not precisely correspond to the topographic survey. Colonel Keiser explained that when he made his determination he used large scale photographs rather than the reductions that were introduced. (Tr. p. 23).

information by a site survey. (Tr. p. 24). The District Engineer concluded that the fill would result in minor effects on navigation and that it had "decreased productivity in deeper water areas of the estuarine. The fill work has also eliminated habitat nesting, feeding and wading areas for a number of birds and animals." (Gov't Ex. 2, pp. 4-5). Colonel Keiser found "on balance, that the public interest is best served by denial of the permit application and removal of the fill to the historic mean high water line." (Gov't. Ex. 2, p. 6).

This Court finds that there was a rational basis for his conclusions and ruling.

> "It was consistent with the applicable regulations, 33 C.F.R. § 209.120, and with the three major pieces of legislation which set policy in this area, the National Environmental Policy Act of 1969, 42 U.S.C. § 4331-4347, the Fish and Wildlife Coordination Act of 1934, 16 U.S.C. § 771-666c, and the Rivers and Harbors Appropriation Act of 1899. The Corps properly considered environmental factors in making its decision. Zabel v. Tabb, *supra*. It properly consulted other agencies in making its decision. United States v. Moretti, 5th Cir. 1973, 478 F.2d 418. See also Bankers Life and Casualty Company v. Village of North Palm Beach, 469 F.2d 994 (5 Cir. 1972)."
>
> *DiVosta Rentals, Inc.* v. *Lee, supra* 488 F.2d at 681.

III

A few words concerning Diamond's amendments are proper at this point.

First, he contends that the District Engineer was not authorized to deny the permit. This is ill founded.

Section 209.120(i) authorizes such action by the District Engineer. Under 33 C.F.R. § 209.120(p)(1), the district engineer may deny a permit "when a State has objected to a required certification of compliance with its coastal zone management program."

Secondly, Diamond claims that a permit is not required for fill prior to December 18, 1968. Colonel Keiser testified that the fill placed prior to that time would not have to be removed. (Tr. pp. 13–14).

Thirdly, Mr. Diamond contends that there has been an unlawful taking of his property and that he has sustained damage as a result. The Administrative Procedure Act does not constitute a waiver of sovereign immunity as to suits for money damages. *Warner* v. *Cox*, 487 F.2d 1301 (5th Cir.). The Act itself states that it is restricted to cases "seeking relief other than money damages." 5 U.S.C. § 702.

ORDER

The decision of defendants denying plaintiff's application for an after-the-fact permit is affirmed. Judgment in CV475–221 will be entered in favor of the defendants.

This August 2nd, 1978.

/S/ ALEXANDER A. LAWRENCE

Judge, United States District Court
Southern District of Georgia

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA SAVANNAH DIVISION

Civil Action No. 479-159

HERMAN DIAMOND, PLAINTIFF

v.

Honorable, Judge,

ALEXANDER A. LAWRENCE, DEFENDANT.

ORDER DENYING PLAINTIFF'S MOTION TO RECUSE

On May 7, 1979, Mr. Diamond filed a "Complaint and Injunction," styled Herman Diamond vs. Honorable Judge, Alexander A. Lawrence, CV479-159. He seeks to disqualify me from presiding in the case of Diamond vs. Marland, CV477-80 on the basis of my alleged personal bias against him.

A hearing in the latter case is scheduled for May 10, 1979, on the motions for summary judgment by the defendants. Notice was mailed to the parties on April 26, 1979. Since that time, Mr. Diamond's counsel has withdrawn from the case.

The action is instituted pursuant to 42 U.S.C. §§ 1983, 1985(3) alleging violation of plaintiff's civil rights. Jurisdiction is predicated on 28 U.S.C. § 1343(4). Mr. Diamond asks that an injunction issue and that the May 10th hearing be vacated.

The complaint in 479-159 alleges that, in two prior actions involving Mr. Diamond, I have ruled contrary to the Georgia Cession of 1802 and have unlawfully confiscated his property.[1] An injunction is not the proper means to seek recusal of a judge. Under the statute, the proper method is by filing an affidavit of bias. 28 U.S.C. § 144. Herman Diamond's complaint will be deemed to be a renewal of the motion for disqualification previously filed in 477-80.[2]

Attached to Diamond's complaint in 479-159 is a copy of the "Verified Application to Disqualify Judge" which Mr. Diamond filed in 477-80. The former motion for recusal was based only on 28 U.S.C. § 144.[3] However, it will likewise be considered as filed pursuant to 28 U.S.C. § 455.[4]

Mr. Diamond apparently relies on the language in § 144 that, upon the filing of an affidavit of prejudice

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[1] See *United States* v. *Diamond*, 512 F.2d 157 (5th Cir.), cert. den. 423 U.S. 928; *Diamond* v. *Marland*, 395 F. Supp. 432 (S.D., Ga.).

[2] As I recall, I indicated orally that I was denying the motion to recuse myself in 477-80 at a hearing held in CV3092 and CV477-221. In a letter to this Court dated September 27, 1977, Ralph Snow, Diamond's former counsel, indicated that Diamond no longer wished to appeal denial of the application for disqualification. He added, "Mr. Diamond also asked me to express his appreciation to the Court staff and to your Honor personally for the cooperative attitude expressed to him recently . . ."

[3] "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding."

[4] "(a) Any justice, judge, magistrate, or referee in bankruptcy

against a judge, "such judge shall proceed no further therein . . ." However, "[t]he mere filing of an affidavit of bias pursuant to 28 U.S.C. § 144 does not require a trial judge to disqualify himself from a particular case." *United States* v. *Dansker*, 537 F.2d 40, 53 (3rd Cir.), cert. den. 429 U.S. 1038. "It is only after the judge against whom it is directed examines the affidavit and finds it to be timely and sufficient that his disqualification is made mandatory." *United States* v. *Partin*, 312 F. Supp. 1355, 1359 (E.D., La.).

"Once the motion is filed under § 144, the judge must pass on the legal sufficiency of the affidavit, but may not pass on the truth of the matters alleged." *Davis* v. *Board of School Commissioners of Mobile County*, 517 F.2d 1044, 1051 (5th Cir.), cert. den. 425 U.S. 944. "The legal sufficiency of the affidavit is determined by ascertaining whether it contains facts which would 'convince a reasonable man that a bias exists.' It is clear, however, that the facts alleged in the affidavit must show that the judge's bias is personal, as opposed to judicial, in nature." *United States* v. *Archbold-Newman*, 554 F.2d 665, 682 (5th Cir.), cert. den. 434 U.S. 1000.

The first seven "facts" in Diamond's application and the only ground alleged in 479-159 are that I have presided in prior cases involving him and related mat-

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of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; . . ."

ters and have ruled against him. "The § 455 determination, like the § 144 determination, should rest upon extrajudicial rather than judicial conduct. [Cit.] Appellant's grievance against members of this court concerns only judicial conduct: he complains of prior rulings by the court. Such allegations are insufficient grounds for disqualification." *Hepperle* v. *Johnston*, 590 F.2d 609, 614 (5th Cir.). See *Duplan Corporation* v. *Deering Milliken, Inc.*, 400 F. Supp. 497 (D.S.C.).

The other claim of personal bias is unsupported and is insufficient in law. *Parrish* v. *Board of Commissioners of the Alabama State Bar*, 524 F.2d 98, 101 (5th Cir.), cert. den. 425 U.S. 944.

The affidavit in 477–80 and the complaint filed in 479–159, construed together or separately, are legally insufficient to require disqualification. The motion for recusal is denied.

The foregoing is deemed a sufficient answer to the complaint filed in CV479–159. The Clerk will file a copy of this Order in CV479–159 and in CV477–80.

The motions for summary judgment in Diamond vs. Marland will be heard as scheduled at 9:00 a.m. on May 10, 1979, in the third floor courtroom of the Federal Building, Savannah, Georgia.

This May 9th, 1979.

/s/ ALEXANDER A. LAWRENCE

Senior Judge, United States District Court
Southern District of Georgia

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA SAVANNAH DIVISION

HERMAN DIAMOND, PLAINTIFF

v.

DR. FREDERICK C. MARLAND, Department of Natural Resources, State of Georgia; COLONEL EDWIN C. KEISER, District Engineer; COLONEL FRANK WALTER, District Engineer; STEVEN OSVALD, Permit Section, Engineers; WILLIAM L. YOUNG, Engineer; EDWARD MYATT, Engineer; GLENN F. MACAULEY, of the United States Corps of Engineers, Savannah, Georgia, District, DEFENDANTS

ORDER ON MOTIONS OF THE DEFENDANTS FOR SUMMARY JUDGMENT

I.

This is a civil rights action brought by Herman Diamond under 42 U.S.C. §§ 1983 and 1985(3)[1] and for

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[1] 42 U.S.C. § 1983. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C. § 1985 (3). "If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either di-

alleged violation of his rights under the Fifth, Fourteenth and other Amendments to the federal Constitution. Before this Court are motions for summary judgments by Dr. Marland, Director of Marshland Protection of the Georgia Department of Natural Resources, and the Federal Defendants, Colonel Edwin Keiser and Colonel Frank Walter, District Engineers of the Army Corps of Engineers; Civil Engineers William Young and Glenn Macauley, and Steven Osvald, Director of Permits; and Edward Myatt, engineer.[2]

The complaint alleges that Marland unlawfully verified complaints against Diamond in prior actions by the State of Georgia and by the United States under their respective marshland protection statutes and Regulations. It is claimed that he conspired[3] with other defendants to deprive plaintiff of his civil rights in the suit by the United States for injunctive relief against filling marshland and also deprivation of his rights under the Federal Constitution.

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rectly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property . . . the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

[2]John Glenn Herndon, also of the Corps of Engineers, was originally named as one of the defendants. He was striken as a party by order of this Court dated May 16, 1979.

[3]A civil conspiracy is not actionable *per se*. The gist of the cause of action is not the conspiracy or combination, it is the tort perpretated upon the plaintiff with resultant damage. *Johnson v. Ellington*, 196 Ga. 846; *Cook v. Robinson*, 216 Ga. 328.

In the suit now before this Court, it is alleged that Dr. Marland caused the unlawful arrest of plaintiff under color of the Georgia Coastal Marshlands Protection Act of 1970. It is claimed that Engineers Keiser and Walter presented false and misleading affidavits in obtaining the injunction under the 1974 deicsion of this Court. Civil Engineers Young and Macauley are alleged to have knowingly given false testimony in that litigation. It is further claimed that Young testified falsely as to tide levels on plaintiff's property and that Macauley wrongly interpreted aerial photos of the Diamond property introduced at the trial by the Corps of Engineers.

The Government contends in its motion for summary judgment that Diamond is seeking to reargue and relitigate matters and issues already decided by this Court against him and affirmed by the Fifth Circuit Court of Appeals. It is argued that the principles of *res judicata* and collateral estoppel apply.

Counsel for Marland makes a like contention to the Government's in connection with his motion for summary judgment.

II.

Antecedents of Present Litigation

Diamond is a chronic litigator. The antecedents of the present litigation include the following actions previously brought against or by him in connection with this controversy.

1. State v. Diamond in the State Court of Chatham County in 1974 for filling marshland without a State permit. Diamond was acquitted after a jury trial.

2. United States v. Diamond (S.D., Ga., Civil Action No. 3092, 1974). Suit for injucntive relief by Government for unauthorized filling of marshland contrary to federal law and regulations. Decision rendered against Diamond. The grant of injunctive relief by this Court was affirmed on appeal. See *United States* v. *Diamond*, 512 F.2d 157 (1975), *cert. den.* 423 U.S. 928.

3. *Diamond* v. *Marland, et. al.*, Civil Rights action brought in 1974 by Diamond in this Court against Dr. Marland, two Chatham County police officers, two State Rangers and the Commissioners of Chatham County. That action was based on his arrest without a warrant and the resulting prosecution in the State Court of Chatham County. The decisions by this Court against Diamond growing out of the warrantless arrest are reported in *Diamond v. Coleman, et. al.*, 395 F. Supp. 429 (1975). No appeal was taken from this ruling.

4. In Diamond v. United States (S.D., Ga., CV 475–221) plaintiff sued for damages as a result of the denial by the Corps of Engineers of Diamond's request for an after-the-fact permit for filling marshland. The suit was consolidated with that in *United States* v. *Diamond* (CA 3092) and, following an evidentiary hearing, was decided against him on August 2, 1978. The denial of an after-the-fact permit was appealed to the Court of Appeals and is currently pending there.[4]

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[4] Also pending before the Court of Appeals is an appeal from an order dated August 2, 1978, denying Diamond's motion under F.R. Civ. P. Rule 60(b) for relief from the injunction obtained by the Government in *United States* v. *Diamond* in 1974.

5. Motion to recuse on ground of prior unfavorable rulings. See *Diamond* v. *Judge Lawrence* (CV 479–159, 5/9/79). Dismissed.

III.

Arguments were heard on May 10, 1979, from 9:00 A.M. to 11:30 A.M. Diamond argues his own case for an hour and a half. Counsel for the Federal Defendants contended that the issues raised in this suit were adjudicated in earlier litigation between the parties. In its motion for summary judgment the attorneys for Dr. Marland argue that he was a defendant in the earlier case of *Diamond* v. *Marland et. al.* (CV 474–40) in which summary judgment was granted to the defendants. The present action, his counsel insists, involves the same issues of law and fact previously presented.

Counsel for the Federal Defendants argue that United States v. Herman Diamond (No. 3092) decided the present action adversely to him. (Federal Defendants' brief at 4–5). It is further contended that their actions are clothed either with absolute or qualified governmental immunity. See *Butz* v. *Economou*, 438 U.S. 478.

What Diamond is trying to do is relitigate issues previously determined against him. His argument at the hearing on May 10th last was reported but was not transcribed. My impression is that he raised anew all issues decided against him in previous cases. The reporter replayed the tape and made some notes. Along with much irrelevant argument, Diamond contended that defendants conspired to deprive him of the use of

his property which was effectuated by officials of the Corps of Engineers furnishing false and misleading affidavits and giving false testimony at the trial of the 1974 case. Plaintiff requested that he be allowed to plead this to a jury.

It is clear that Diamond is riding the same old nag with a different saddle.

IV.

As the present complaint is drawn, 28 U.S.C. §§ 1983 and 1985(3) is extended to all of the defendants. Those sections provide a remedy in the federal courts only in the case of State action and not against officers and agents of the federal government acting under color of federal law. See *Bethea* v. *Reid*, 445 F.2d 1163 (3rd Cir.), *cert. den.* 404 U.S. 1061; *Robinson* v. *Wichita Falls & North Texas Community Action Corporation*, 507 F.2d 245 (5th Cir.). The remedy for conspiracy provided in 1985(3) embraces only State action and does so only where there is "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin, et. al.* v. *Breckenridge, et. al.*, 403 U.S. 88, 102. That element does not appear here.

The only claim of Diamond remaining is his contention that the defendants violated his rights under the federal Constitution. In *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 383, the Supreme Court held that a district court's jurisdiction under 28 U.S.C. § 1331 extended to civil damage actions alleging a violation of the Fourth Amendment. More recently, the Supreme

Court has held that that same jurisdictional basis applied to civil damage actions alleging violation of equal protection under the Fifth Amendment. *Davis* v. *Passman*, ___ U.S. ___ (47 L.W. 4643). Under those decisions, this Court has jurisdiction over Diamond's claims pursuant to § 1331.[5]

Except in the broadest sense, one cannot find in the record that the Corps of Engineers and its officials acted contrary to lawful authority or in derogation of the federal Constitution.[6] However, this case is before me on motion for summary judgment and I do not base my decision on that point in the light (or better, the crepuscule) of *Bivens* and *Passman*. As to both Marland and the Federal Defendants, I find firmer ground in relying on the doctrine of *res judicata* and collateral estoppel.

V.

Counsel for all the defendants contend that the issues raised by Diamond's present complaint are barred

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[5] The case of *Butz* v. *Economou*, *supra*, involved a suit against the Secretary of Agriculture, the Chief Hearing Examiner and other officers of the Department. The Government contended that the defendants possessed absolute immunity from a suit for damages. However, the Supreme Court in a 5 to 4 decision held that the defendants possessed a qualified immunity, that is, in the case of actions taken in good faith, rather than absolute immunity.

[6] The most that can be said is Diamond's insistence that in the trial before this Court in 1974 officials of the Corps of Engineers lied. In libel and slander cases relevant affidavits and testimony of witnesses at a trial are absolutely privileged under Georgia law and federal common law. See Ga. Code Ann. §105-709; *Dennis* v. *Adcock*, 138 Ga. App. 425; *Fedderwitz* v. *Lamb*, 195 Ga. 691; *Expedition Unlimited Aquatic Enterprises, Inc.* v.

by the principles of collateral estoppel. Under that doctrine, the relitigating of issues of fact decided in earlier cases involving the same parties is not permitted. The purpose is to prevent the needless repetition of litigation between parties when they have had a fair opportunity to press their claims. A party to prior litigation is collaterally estopped from raising any claims or defenses that could have been raised therein. *Aerojet-General Corporation* v. *Askew*, 511 F.2d 710 (5th Cir.), *cert. den.* 423 U.S. 908. "While res judicata bars relitigation of the same cause of action, collateral estoppel bars relitigation of the same facts or issues that were necessarily determined in the prior proceeding." *Carr* v. *United States*, 507 F.2d 191, n. 5 (5th Cir.), *cert. den.* 422 U.S. 1043. See also *United States ex rel. Harshman* v. *County Court of Knox County*, 122 U.S. 306, 318.

Diamond's claim that Dr. Marland unlawfully procured his arrest was raised and previously decided. In *Diamond* v. *Marland, et. al.*, 395 F. Supp. 432, plaintiff brought a civil rights action against him and others alleging that "Marland caused the four defendant law enforcement officers to unlawfully arrest and detain plaintiff." Diamond also claimed that his actions violated his Constitutional rights under the Fourth, Fifth, and Fourteenth Amendments. This Court granted Marland's motion for summary judgment on the ground that there was probable cause for the arrest.

Plaintiff claims in the action now before me that Dr. Marland conspired with the federal defendants to deny

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Smithosonian Institution, et. al. 566 F.2d 289 (C.A.D.C.); *Brown* v. *Collins*, 402 F.2d at 212-213 (C.A.D.C.).

him due process in the trial in 1974 in the case of *United States* v. *Diamond,* CA No. 3092. Presumably Mr. Diamond is of the opinion that Dr. Marland perjured himself in testifying in that case. In any event, it is clear that at the evidentiary hearing therein he could have sought to establish such a claim. Similarly, the allegation that the Federal Defendants conspired to deprive him of his rights by perjuring themselves during the trial of *United States* v. *Diamond* (CA No. 3092) raises the issue of the conclusiveness of the findings based on their testimony. Full opportunity existed for plaintiff to explore that possibility at the trial of the action for injunctive relief.

The only difference between the present action and what was decided adversely to Diamond in the past is the claim by him that there was a *conspiracy* by all of the defendants herein to perjure themselves by giving false testimony as witnesses in the prior suits in this Court. The mere branding thereof as a "conspiracy" does not change the substance of things. The testimony of the defendants, whether right or wrong, was the basis of the adverse decisions. It is a matter of law, conclusive and preclusive of relitigation on the theory of a conspiracy. Nor does the fact that the Federal Defendants here were not actual parties to *United States* v. *Diamond, supra,* (CA No. 3092) affect at all the conclusiveness of the findings against Diamond based on their testimony. "Under the federal law of res judicata, a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely alligned with his interests as to be his virtual representative." *Aerojet-General Corporation* v. *Askew, supra,* at 719.

Diamond had a full and fair opportunity at the hearing on the injunction to raise the issue of the witnesses of the Corps of Engineers giving false testimony. As stated above, collateral estoppel applies not only to defenses that were expressly raised but to those that could have been raised in a former action. See *Aerojet-General Corporation* v. *Askew, supra.* That aside, the determination of the question of falsity of testimony is implicit in the findings of this Court that the Government witnesses in the prior hearing were not lying, but in fact were telling the truth. Wherein is there any difference, save in terminology, in Diamond arguing then that the witnesses gave false testimony and in now claiming that they agreed among themselves to do so? For the foregoing reasons defendants' motions for summary judgment must be granted and the conspiracy action dismissed. Judgment to that effect will be entered.

This July 20th, 1979.

/S/ ALEXANDER A. LAWRENCE

SENIOR JUDGE, UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

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